IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

NO. 78-1597

CERTIFIED GROCERS OF CALIFORNIA, LTD., a California corporation,

Petitioners,

vs.

ANTONIO R. LEYVA, EDWARD A. BELL, RICHARD O. BRENNER, DAVID CAHAL, WELDON R. CHAPMAN, RICHARD CHASE, GARTH E. COOK, MICHAEL J. COOK, ROBERT S. CROMWELL, CLYDE V. DARR, WESLEY DRAKE, VERN ELLYSON, GEORGE W. FIELDS, JR., PAUL A. FOX, JR., WALTER C. FREEMAN, ROBERT LeROY FULLER, RODNEY G. GOAR, DAVID G. GOLDSMITH, EVERETT JOHNSON, MARSHALL D. JOHNSON, ALBERT G. KNOLL, LEE A. LEWIS, THOMAS P. LUCAS, JOHN J. LUTZ, HARRY C. McMULLAN, FRANCIS C. MILLER, DONALD A. NELSON, WILLIAM D. PATTERSON, LARRY T. PEARCE, BOB ROBERTS, ROBERT J. SABOL, DAVID P. SCHOLERS, DONALD RAY TOWE, ROBERT S. WELLS and ARTHUR WOOLEY,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COME NOW Respondents, and respectfully present this brief to the Court (pursuant to the June 1, 1979 request of the Clerk

of the Court), in opposition to the Petition for a Writ of Certiorari filed by Petitioner herein.

QUESTION PRESENTED

Are employees' statutory claims for unpaid overtime wages, liquidated damages, and reasonable counsel fees under the Fair Labor Standards Act [29 U.S.C. §201, et seq] "referrable to arbitration" under the United States Arbitration Act [9 U.S.C. §3], where the grievance/arbitration provisions of the collective agreement preclude an arbitrator from adjudicating most of the employees' substantive and remedial claims?

STATEMENT OF THE CASE

On July 12, 1976, Respondents, all of whom are long haul drivers employed by Petitioner Certified Grocers of California, Ltd., filed their Complaint, claiming (1) three years' unpaid overtime compensation, an equal amount of liquidated damages, and reasonable attorneys' fees and litigation costs under the Fair Labor Standards Act [29 U.S.C. §201, et seq]

(First Cause of Action), and (2) unpaid overtime wages allegedly due them under the Wholesale Delivery Drivers Agreement between Petitioner and Teamsters Local Union No. 848 (Second Cause of Action).

Respondents' work consists of hauling truck loads of grocery products to and from Certified's Los Angeles warehouse(s), to and from points which are virtually all located within the borders of the State of California. Petitioner has paid Respondents for their intrastate long haul driving hours in accordance with a "mileage"-per-trip formula, set forth in a "Long Haul Agreement" (hereinafter referred to as the "Addendum"), which takes no account of the actual driving hours worked by Respondents--rather than paying Respondents the hourly rate of pay (for straight time and overtime hours) which they contend they should be paid under both the F.L.S.A. and the Wholesale Delivery Drivers Agreement (hereinafter referred to as the "Agreement"). Respondents contend that the Addendum is legally invalid, because it violates the F.L.S.A.'s overtime compensation requirements, and because its

"mileage"-rate provisions have never been submitted to Respondents, by Teamsters Local 848, for ratification or rejection.

Respondents' Union has repeatedly rejected their demands that the "mileage"-rate (and the fictitious "hourly" rate) in the Addendum be discontinued, by negotiation, and that the Union prosecute their grievances protesting denial of overtime pay to intrastate long haul drivers. Under the grievance and arbitration provisions of the Agreement, only the Union--which has never been a party to this lawsuit--has authority to file, prosecute, and arbitrate such grievances.

On February 11, 1977, on motion of Petitioner, the District Court entered an order staying this action "until arbitration has been had in accordance with the collective bargaining agreement". Respondents appealed from that interlocutory order, and on March 19, 1979, the Court of Appeals for the Ninth Circuit issued its decision on that appeal [Appendix "A" to the Petition for Writ of Certiorari herein].

On May 1, 1979, Petitioner filed a lawsuit in the District Court, styled Certified Grocers of California, Ltd. v. Wholesale Delivery Drivers & Salesmen's Union Local 848 [sic], Case No. 79 1573-AAH (PX), seeking declaratory relief, "damages" in whatever sum Respondents may recover from Petitioner herein, and "attorneys' fees and costs" which Petitioner has incurred in defending this lawsuit. On June 18, 1979 (pursuant to an order shortening time granted on the same date), the District Court, over the opposition of all other parties, granted Petitioner's motion to consolidate the two lawsuits, for trial and all other purposes.

In its decision, the Court of Appeals held (inter alia) that

> Count II of the Complaint, the action for wages due under the collective bargaining agreement, is an arbitrable dispute, . . .and [Petitioner] was entitled to a stay of this part of

the action pending its arbitration. . . .
[Petition, Appendix, p.11];

but remanded the case to the District Court for "exploration" of Respondents' assertion "that the Union. . .cannot conduct the arbitration [of Respondents' contractual claims] in good faith on behalf of the employees" [Petition, Appendix, pp.13-14]. The District Court has never conducted any inquiry, or made any finding(s), with respect to the issue of the Union's representation of Respondents in any arbitration of their claims under the collective agreement; instead, over the objection of all parties, it has scheduled the trial of all causes of action of both lawsuits to commence on July 10, 1979.

REASONS FOR DENYING THE WRIT

Petitioner has failed to demonstrate that the Court of Appeals, in the decision attacked herein, either

> . . .has rendered a decision in conflict with the decision of

> another court of appeals on the same matter; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court. . . .

as required by Supreme Court Rule 19(1)(b).

On the contrary, the Court of Appeals ruled that Respondents' "FLSA claims here are not within the scope of the arbitration clause", and therefore found it

> . . .unnecessary. . .to address the substantive holding of [Beckley v. Teyssier, 332 F.2d 495 (9th Cir. 1964)] that where an FSLA claim is arbitrable, a stay of judicial enforcement must be ordered pending resolution by the arbitrator. . . .
> [Petition, Appendix, p.10] [emphasis added]

Moreover, even if the Court of Appeals

decision had not been expressly premised upon its construction of the grievance/arbitration provisions of the collective agreement, the holding that Respondents' F.L.S.A. claims were not arbitrable was thoroughly consistent with the decisions of this Court [Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974); United States Bulk Carrier v. Arguelles, 400 U.S. 351 (1971); McKinney v. Missouri-Kansas-Texas Railroad Co., 357 U.S. 265 (1958)], the National Labor Relations Board [General American Transportation Corporation, 228 NLRB No. 102 (1977); Filmation Associates, 227 NLRB No. 237 (1977)], and the only other courts of appeal which have considered that precise issue [Leone v. Mobil Oil Corporation, 523 F.2d 1153 (D.C. Cir. 1975); Coleman v. Jiffy June Farms, Inc., 458 F.2d 1139 (5 Cir. 1972)]--all to the effect that employees' federal statutory rights may not be relegated to the arbitral forum.[1/]

1/ Petitioner's contention that Satterwhite v. United Parcel Service, Inc., 496 F.2d 448 (10th Cir. 1974), cert. denied, 419 U.S. 1079 (1974) is "a decision in (Cont.)

1/ Cont.

conflict with the [instant] decision. . . on the same matter", is not supported by the holding of that case or the facts underlying it. At most, Satterwhite held that an arbitration award--issued upon employees' prior, voluntary submission of unpaid overtime compensation grievances--"is dispositive of a statutory claim under FLSA" asserted in a subsequent federal court lawsuit. 496 F.2d at 450, 452. In that case, the employees had already received, through arbitration prosecuted by their union, (straight time) recovery on part of their (time-and-one-half) claims; in the instant case, however, Respondents have attempted, in vain, for several years, to induce Teamsters Local 848 to prosecute their contractual claims for unpaid overtime compensation, and the overt conflict between Respondents and their Union is a critical issue, which precludes referral of their F.L.S.A. claims to "arbitration" by their adversaries. Glover v. St. Louis-San Francisco Railway Company, 393 U.S. 324 (1969); Coleman v. Jiffy June Farms, Inc., 458 F.2d 1139 (5 Cir. 1972); Hiller v. Liquor Salesmen's Union Local No. 2, 338 F.2d 778 (2d Cir. 1964); cf. IBEW Local 675 (S&M Electric Co.), 223 NLRB No. 223 (1976), Kansas Meat Packers, 198 NLRB 543 (1972). Finally, it must be noted that only by utterly ignoring this Court's Arguelles decision could the Satterwhite court have opined "that Congress intended that wage disputes and racial disputes should not receive the same treatment". 496 F.2d at 451.

CONCLUSION

For all of the foregoing reasons, Respondents respectfully submit that the Petition for a Writ of Certiorari should be denied.

Dated: June 27, 1979

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